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NO. 93-1761

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROBERT M. SCHMIDT AND RICHARD A. MASSMAN,
CO-TRUSTEES OF THE
LEON A. SCHMIDT CHILDREN'S TRUST NO. 1,
Petitioners

v.

STATE OF TEXAS AND CITY OF AUSTIN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF IN OPPOSITION

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38 pp

QUESTIONS PRESENTED FOR REVIEW

Does the United States Supreme Court have jurisdiction to review the final judgments of the Supreme Court of the State of Texas pursuant to 28 U.S.C. §1257(a) (1988) where the Texas Supreme Court has neither passed on the federal constitutional issues urged before this Court nor were those issues properly raised in the State court?

Did the Texas Supreme Court, in adopting the rule of the United States Supreme Court announced in *Campbell v. United States*, 266 U.S. 368 (1924), violate the Just Compensation Clause of the Fifth Amendment or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

Respondents adopt the statement of Petitioners with respect to the parties as they appeared before the Supreme Court of Texas.

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PETITION FOR WRIT OF CERTIORARI TO
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BRIEF IN OPPOSITION

OPINIONS BELOW

The "Opinions Below" section of the Petition For Writ of Certiorari accurately summarizes the lower court proceedings.

NO JURISDICTION

Respondents object to Petitioners' Statement of Jurisdiction.[1] This Court lacks jurisdiction to review the Texas Supreme Court judgment because it was based entirely upon Texas statutory law and judicial precedent. The Petitioners did not raise, in any Texas court, the federal constitutional issues they complain of now until their motion for rehearing to the Texas Supreme Court, which was overruled without comment.[2] Under Texas law, a

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[1] Pet. at 2.

[2] Res. App.

constitutional challenge must be made at the trial court level unless the challenge constitutes fundamental error. *Pedraza v. Tibbs*, 826 S.W.2d 695, 698 (Tex. App.--Houston [1st Dist.] 1992, writ denied); *Thompson v. Ereckson*, 814 S.W.2d 805, 808 (Tex. App.--Waco 1991, no writ); *Johnson v. Lynaugh*, 800 S.W.2d 936, 939 (Tex. App.--Houston [14th Dist.] 1990, writ denied). Moreover, in the absence of fundamental error, a constitutional challenge may not be raised for the first time in the Texas Supreme Court, especially on motion for rehearing. *Johnson v. Lynaugh*, 796 S.W.2d 705, 707 (Tex. 1990); *Aetna Life Ins. Co. v. Wells*, 566 S.W.2d 900, 901 (Tex. 1978); *Watson v. Glen Falls Ins. Co.*, 505 S.W.2d 793, 797 (Tex. 1974); Tex. R. App. P. 131(e) and 190(b). Petitioners are not even asserting fundamental error. "Fundamental error survives today in those rare instances in which the record shows

the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas." *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982). Under the circumstances presented here, 28 U.S.C. §1257(a) (1988) does not confer jurisdiction on this Court.

This Court addressed these very jurisdictional issues in *Yee v. Escondido*, __ U.S. __ (1992), 112 S.Ct. 1522 (1992). In *Yee*, petitioners attempted to raise a substantive due process claim for the first time in their petition for review which was denied by the California Supreme Court. Noting that petitioners did not raise a substantive due process claim in the state courts and that no state court had addressed such a claim, this Court held that it

> has, with very rare exceptions, refused to consider petitioners' claims that were not raised or

> addressed below. *Illinois v. Gates*, 462 U.S. 213, 218-220, 103 S.Ct. 2317, 2321-2323, 76 L.Ed.2d 527 (1983). While we have expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts, see *ibid.*, we need not resolve the question here. (In cases arising from federal courts, the rule is prudential only. See, *e.g.*, *Carlson v. Green*, 446 U.S. 14, 17, n. 2, 100 S.Ct. 1468, 1470, n. 2, 64 L.Ed.2d 15 (1980).) Even if the rule were prudential, we would adhere to it in this case. Because Petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here. *Id.* at 1531.

This Court should be even more reluctant to accept jurisdiction, where, as in the instant case, separate, compelling and long-standing state law authorities, both statutory and by judicial precedent, support the Texas Supreme Court decision. For example, an independent and adequate state law ground will defeat this Court's jurisdiction *even where a question of*

federal law is decided by a state court (which is, of course, denied here by Respondents). *Coleman v. Thompson*, __ U.S. __, __ (1991); 111 S.Ct. 2546, 2553-54 (1991), *citing Fox Film Corp. v. Muller*, 296 U.S. 207, 210, (1935); *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L.Ed 635 (1872).

RESPONSE TO PETITIONERS' STATEMENT

Prior to the taking, Petitioners' tract of land was situated on United States Highway 183 ("U.S. 183"). At that time, U.S. 183 consisted of six lanes of traffic, three each for northbound and southbound traffic. The northbound and southbound lanes were separated by a grassy median. Approximately ten years prior to trial, the City Council of Austin, Texas petitioned the Texas Department of Transportation to

alleviate traffic congestion on U.S. 183. An approximate six-foot wide strip of Petitioners' land was acquired to meet federal guidelines for highway construction, although no structures or parking spaces were constructed on the part taken. The highway improvement project will improve U.S. 183 such that local traffic will be able reach adjacent properties, including Petitioners' property, through a system of frontage or access roads consisting of three southbound and three northbound lanes. The access roads are virtually identical to the original U.S. 183 except that they will be curbed and guttered.

Six through highway lanes or "main lanes" will be elevated approximately 37 feet above ground level at the Petitioners' property. A system of entry and exit ramps will connect the access roads to the main lanes.

At trial, Petitioners and Respondents stipulated to the value of the part taken and the case was tried on the issue of the damages, if any, to the remaining property. Evidence was admitted, over Respondents' objections, pertaining to damages Petitioners alleged were due to (1) diversion of traffic, (2) increased circuity of travel to the property, (3) lessened visibility to passersby, and (4) inconvenience of construction activities.

Respondents denied any such compensable damages and adduced testimony that the value of the remaining land was $367,441.00 before and after the taking (no diminution in the value of the remainder). Petitioners testified that their remaining land was worth $117,455.00 less as a result of the proposed highway improvements. Both Petitioners' and Respondents' real estate value experts testified that the entire

tract had a market value of $375,000.00 prior to the taking. The jury found damages to the remaining property in the amount of $74,880.00 and Respondents appealed.

The Third District Court of Appeals at Austin affirmed. Application for Writ of Error was made by Respondents to the Texas Supreme Court on the jurisdictional ground that there was a conflict between the Third District Court of Appeals decision in this case and that of the First District Court of Appeals in *Olson v. Harris County*, 807 S.W.2d 594, 595 (Tex. App.--Houston [1st Dist.] 1990, writ denied). Application for Writ of Error was granted.

Citing authorities spanning more than 100 years of Texas jurisprudence, a unanimous Texas Supreme Court reversed the judgment of the Third Court of Appeals and modified the judgment of the trial court to exclude community damages. Petitioners

attempted to raise the federal constitutional issues complained of here, for the first time, on motion for rehearing which was overruled without comment on February 2, 1994.[3]

Respondents except to Petitioners' characterization of the factual record in the following particulars:

1) There was no evidence as to the existence of "mountainous piles of dirt" at, or to be placed in front of, the Petitioners' property as a result of the project.[4]

2) There was no evidence of the retail building located on the remainder being "so close to the elevated structures that it will appear as if 'inside a cavern'."[5]

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[3] Res. App.

[4] Pet. at 4.

[5] Pet. at 4.

3) The jury did not find the value of the part taken to be $7,559.00. This was stipulated by counsel for the parties before trial.[6]

4) Petitioners' characterization of the Texas Supreme Court's holdings[7] are not accurate. The Texas Supreme Court held that the damages claimed by Petitioners did not amount to a taking or damaging of property that is compensable in an inverse condemnation case; that the general rule in inverse condemnation cases and condemnation cases has been the same with respect to the elements of injury; that it had never allowed recovery for severance damages like those claimed by Petitioners; that the damages claimed by Petitioners did not result from the taking of their property, but from the State's new use of its

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[6] Pet. at 5.

[7] Pet. at 5.

existing right-of-way and of property taken from other landowners to widen it and, hence, not recoverable under the Texas statute pertaining to damages recoverable in condemnation cases; and that the damages claimed by Petitioners were community in nature and, therefore, not compensable under the Texas statute pertaining to damages recoverable in condemnation cases.

REASONS FOR DENYING WRIT OF CERTIORARI

I. THE TEXAS SUPREME COURT DECISION WAS BASED ENTIRELY ON STATE LAW.

A unanimous Texas Supreme Court adopted the federal rule announced by this Court in *Campbell v. United States*, 266 U.S. 368 (1924). This being so, it can hardly be seriously argued that this Court's criteria for granting certiorari

have been met. Sup. Ct. R. 10, 28 U.S.C. (1994). Not only do Petitioners misconstrue *Campbell* in urging this Court's grant of certiorari, but they likewise ignore the fact that the Texas Supreme Court's decision rested not on *Campbell* but on §21.042(c) of the Texas Property Code,[6] its prior decision in *State v. Clark*, 336 S.W.2d 612 (Tex. 1960) and a myriad of Texas Supreme Court and appellate decisions construing §21.042(c) and (d) of the Texas Property Code in the context of community injury and benefit. *State v. Schmidt*, 867 S.W.2d 769, 777, 781 (Tex. 1993). Perhaps the best way of demonstrating the unsoundness of Petitioners' arguments is to examine the Texas statute defining the damages to which a condemnee is entitled,

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[6] Tex. Prop. Code Ann. §21.042(c) (Vernon 1984).

§21.042 of the Texas Property Code.' Subsection (c) provides in pertinent part, "the special commissioners shall determine the damage to the property owner after estimating the extent of the injury and benefit to the property owner, including *the effect of the condemnation* on the value of the property owner's remaining property." Tex. Prop. Code Ann. §21.042(c) (Vernon 1984). (Emphasis added).

Subsection (d) provides in its entirety: "[i]n estimating injury or benefit under Subsection (c), the special commissioners shall consider an injury or

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' It is noted by respondents that Petitioners represent in their appendix at page A3 that §21.042(e) of the Texas Property Code was declared unconstitutional. Such is not the case. The Texas decision in *State v. Enterprise Co.*, 728 S.W.2d 812, 813 (Tex. App.--Houston [14th Dist.] 1986, writ denied) held that to the extent the language contained in this subsection is suggestive that the Legislature might have intended to change the method for determining adequate compensation for land condemned for highway purposes by allowing a reduction to a Condemnee's compensation for the part taken equal to the estimated benefits to the condemnee's remaining property, it is inconsistent with the Texas Supreme Court's interpretation of the pertinent state Constitutional provision.

benefit *that is peculiar to the property owner* and that relates to the property owner's ownership, use, or enjoyment of the particular parcel of real property, but *they may not consider an injury or benefit that the property owner experiences in common with the general community.*" *Id.* at §21.042(d). (Emphasis added). These statutes are the foundation upon which the entire body of Texas law rests in condemnation cases involving partial takings. It was the application of these statutes which compelled the decision of the Texas Supreme Court below.

Petitioners err when they state, at page 6 of their Petition for Writ of Certiorari, "[n]or does this Petition ask this Court to determine whether or not damage to property value was sustained *by virtue of the taking* as such *is not challenged by the State.*" (Emphasis added). To the contrary, whether or not damage to

property value was sustained by virtue of the taking is the only question of import and it is challenged by Respondents here as it was in the courts below. As noted by the Texas Supreme Court:

> The State contends that Schmidt and Austex are not entitled to severance damages because the damages they claim did not result from the taking of their property, but from the State's new use of its existing right-of-way and of property taken from other owners to widen it. We agree.
>
> Section 21.042(c) requires consideration of "the effect of the condemnation on the value of the property owner's remaining property." *The effect of the State's condemnation on each tract in the present cases--that is, the taking of a small strip of property--is different from the effect of the State's change in Highway 183. The statute allows recovery only for the former. Schmidt, 867 S.W.2d at 777, 778.* (Emphasis added).

Similarly, the Texas Supreme Court held that the damages complained of by Petitioners were not an "effect of the condemnation on the value of the property

owner's remaining property" within the cognizance of §21.042(c) because they are not allowed by §21.042(d). *Id.* at 781. As stated by the court:

> The diversion of traffic, inconvenience of access, impaired visibility of ground-level buildings, and disruption of construction activities of which Schmidt and Austex complain are, by their nature, a consequence of the change in Highway 183 shared by the entire area through which it runs. While one or more of these elements of injury could affect the Schmidt and Austex tracts in some special, unique way, different from the effect on the surrounding area, there is no claim here that they do. Schmidt and Austex may be impacted more severely than some others in the area, but the difference is one of degree and not of kind. Thus, we agree with the State that the severance damages claimed are not allowed by §21.042(c). *Id.*

Thus, it was Texas law which was and is determinative of the issues presented here.

If Petitioners are correct in their assertion here that the Fifth Amendment compels that every incident of a public project having an effect on the market

value of a property owner's remaining property is compensable where a portion is taken through eminent domain proceedings, then subsection (d) is unconstitutional to the extent it provides for the exclusion of community damages such as those asserted by Petitioners. Yet, at no stage of these proceedings, including motion for rehearing before the Texas Supreme Court, have Petitioners challenged the constitutionality of this Texas statute as applied in this case.

II. THE TEXAS SUPREME COURT DECISION IS IN ACCORD WITH DECISIONS OF THIS COURT INTERPRETING THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE THE DAMAGES PETITIONERS CLAIM TO THEIR REMAINING LAND RESULT FROM THE USE TO BE MADE OF THE LANDS ACQUIRED FROM OTHERS.

Petitioners claim damages to their remaining land as a result of the use to be made of the lands acquired from others. *Campbell* is the law of the land regarding

the applicability of the Fifth Amendment to the facts of this partial taking case. *Campbell*, 266 U.S. at 369-71. In *Campbell*, the United States took part of petitioner John Campbell's land. This Court acknowledged that the petitioner, "[b]ecame entitled to have the just compensation safeguarded by the Fifth Amendment to the Constitution; that is, the value of the land taken and the damages inflicted by the taking - such a sum as would put him in as good a position pecuniarily as he would have been if his property had not been taken. (Citation omitted.) But he was not entitled to have more than that." *Id.* at 371. The Court reasoned that he *was not* entitled to compensation for damages to his remaining land *by reason of the uses to be made of lands acquired from others for the same project*. The Court reasoned:

> [p]laintiff had no right to prevent the taking and use of the lands of others; and the exertion by the United States of the power of eminent domain did not deprive him of any right in respect of such lands. And, if the land taken from Plaintiff had belonged to another, or if it had not been deemed part and parcel of his estate, he would not have been entitled to anything on account of the diminution in value of his estate. *It is only because of the taking of a part of his land that he became entitled to any damages resulting to the rest. In the absence of a taking, the provision of the Fifth Amendment giving just compensation does not apply*; and there is no statute applicable in this case that enlarges the constitutional right. *Id.* (Emphasis added.)

Petitioners' reliance upon *Campbell* is misplaced; *Campbell* establishes the rule that the threshold of the Fifth Amendment is not crossed where compensation is claimed for diminution in value attributable not to the taking but the proposed use of the lands taken from others. *Id.* The point on which *Campbell* turns is not the indispensability of the

land taken for the public project, as argued by Petitioners, but whether the proposed use of the lands taken from others *constitutes a taking of the property owner's property. Id. citing Richards v. Washington Terminal Co.*, 233 U.S. 546, 554 (1914) (Emphasis added). In the case before the Court, fair market value of the part taken is the only damage the property owners suffer. Petitioners' claim for damages to the remainder is based *entirely* upon the proposed use of land belonging to or taken from others. In such circumstances the law is clear. This Court stated in *Richards*,

> [a]ny diminution of the value of property *not directly invaded nor peculiarily affected*, but *sharing in the common burden of incidental damages* arising from the legalized nuisance, is held not to be a "taking" within the constitutional provision. The immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property

> owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad. *Richards*, 233 U.S. at 554. (Emphasis added).

The holding in *Campbell* is plain and well-reasoned:

> The rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, does not include the diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking. *Campbell*, 266 U.S. at 372.

Hence, the damages awarded to a condemnee precipitated by a taking are distinguished from the damages which may accrue on account of the public works or project for which the lands are taken. The Fifth Amendment applies only to the former.

III. THE TEXAS SUPREME COURT DECISION IS IN ACCORD WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

As an initial matter, Petitioners grossly misstate the standard of review.[10] Petitioners argue for a heightened standard of review reserved for protected classes and cite *City of Cleburne, Tex.*[11] Although Petitioners correctly state the heightened scrutiny standard, heightened scrutiny is not applicable to this case. It is nowhere asserted, and could not be argued, that either party is within a class justifying heightened scrutiny. The appropriate rule is "that legislation is *presumed* to be valid and will be sustained if the classification drawn by the statute is *rationally related* to a legitimate state interest. *Heller v. Doe by Doe*, __ U.S.

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[10] Pet. at p. 14.

[11] *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985)

__, __ (1993), 113 S.Ct. 2637, 2642 (1993). (Emphasis added).

The Texas statutes which prescribe the evidentiary confines and the measure of damages in condemnation cases,[12] and which form the basis of the holding of the Texas Supreme Court below, precisely mirror the rules announced by this Court. Indeed, the holding of *Campbell* is exactly the holding of the Texas Supreme Court regarding §21.042(c); that is, "the effect of the condemnation on the value of the property owner's remaining property" includes those damages attributable to the acquisition, not those damages attributable to the use of adjoining lands of others for the same undertaking. *Campbell*, 266 U.S. at 371, 372. Similarly, the rule of *Richards* is exactly the same as §21.042(d) of the Texas

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[12] Tex. Prop. Code Ann. §21.042(b) and (c) (Vernon 1984) discussed *infra*. at pp. 13-18.

Property Code regarding community damages. *Richards*, 233 U.S. at 554.

Finally, Petitioners assert a perceived inequity involving the Texas statutory measure of damages for whole takings.[13] Petitioners assert, citing *City of Fort Worth v. Corbin*,[14] that a property owner whose entire tract is taken will recover its value, including its value attributable to visibility and accessibility. The landowner who owns property adjacent to a public project, but from whom no land is taken, is generally not entitled to compensation for damages attributable to those factors.[15] Though the rules are properly stated, they contribute nothing to Petitioners' argument from a constitutional standpoint. In the former

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[13] Tex. Prop. Code Ann. §21.042(b) (Vernon 1984).

[14] 504 S.W.2d 828, 831 (Tex. 1974)

[15] Pet. at 15.

circumstance there is a taking under the Fifth Amendment while in the latter there is not. The effect of Petitioners' argument on this point is to bolster the counterpoint. It is presumed by Respondents that Petitioners do not take the position in this Court that a landowner who owns property adjacent to a public project, but from whom no land is taken, should be entitled to Fifth Amendment indemnification for any loss occasioned by the project.

Contrary to Petitioners' characterization, the Texas statute as applied by its Supreme Court is in harmony with this Court's precedents. The proposed use by the State of Texas of its own highway right-of-way and of lands taken from others to widen it does not constitute a taking of Petitioners' property for which

compensation is due under the Fifth or Fourteenth Amendments.[16]

CONCLUSION

The decision of the Texas Supreme Court was based on Texas law. No federal issues were decided by or presented to the Texas Supreme Court. The state issues presented to the Texas Supreme Court were decided in accord with this Court's holdings in *Campbell* and *Heller* with respect to Petitioners' Fifth and Fourteenth Amendment issues, respectively.

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[16] Petitioners' reliance on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Lucas v. So. Carolina Coastal Council*, __ U.S. __, 112 S.Ct. 2886 (1992) demonstrates that they have missed the constitutional point. Petitioners confuse the compensability of negative effects of the taking on the property owner's remaining property (for which compensation is required under the Fifth Amendment) with effects on the property owner's remaining property caused by the taking of property of others for the same project (for which compensation is not required by the Fifth Amendment). Applying the rules of *Loretto* and *Lucas*, it is apparent that the diminution in value of Petitioners' remainder does not trigger a taking under the Fifth Amendment because it suffers neither a physical invasion nor a denial of all beneficial or productive use of the land.

Accordingly, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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RE: Case No. D-1006
Style: STATE OF TEXAS AND CITY OF AUSTIN
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CO-TRUSTEES OF THE LEON A. SCHMIDT CHILDREN'S
TRUST NO. 1 ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Respectfully yours,

JOHN T. ADAMS, CLERK

_____

Peggy Littlefield
Chief Deputy Clerk